No 187

IN THE

Supreme Court of the United States

October Term, 1943.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

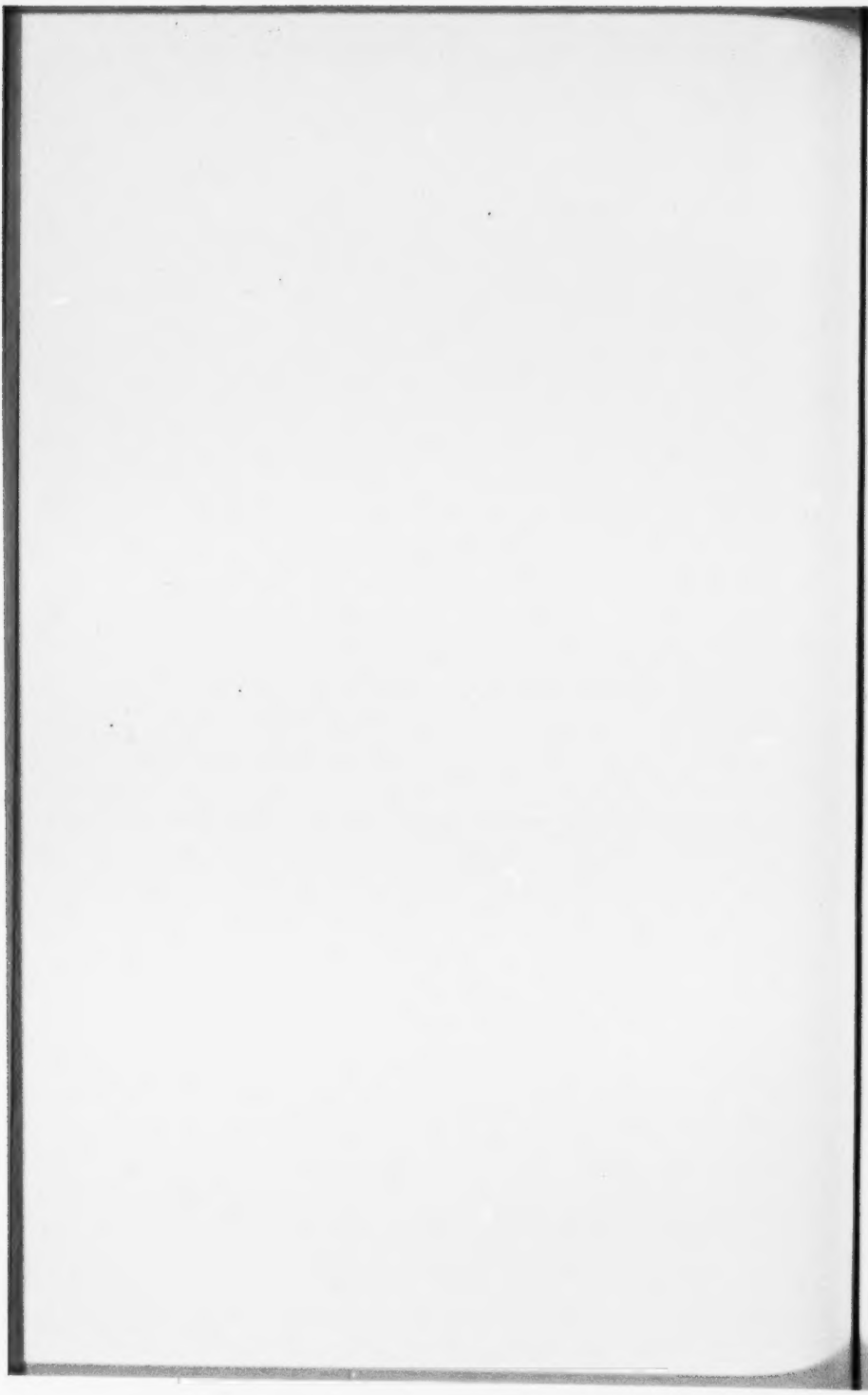
WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

STEPHEN ROGALSKI,
Petitioner in pro. per.,
Box B, Dannemora, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.



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II.

IN THE

Supreme Court of the United States

October Term, 1943.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

The petitioner, Stephen Rogalski, respectfully prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York entered in the above case on April 22, 1943.

Statement of the Case.

This was a proceeding upon a writ of habeas corpus in the Supreme Court of the State of New York at Special Term, held in and for the County of Clinton, to inquire into the legality of the detention and imprisonment of the petitioner in Clinton Prison at Dannemora, New York.

The petition for the writ of habeas corpus alleged that the mittimus under which the petitioner is held in said prison, is invalid, illegal and void, in that it is predicated upon a conviction rendered pursuant to *Section 1898-a of the Penal Law of the State of New York, which statute contravenes, violates and is repugnant to the Fourteenth Amendment to the Federal Constitution (R., pp. 7-8; ff. 21-24).

The Special Term dismissed the writ and remanded the petitioner to the custody of the Warden of said prison, without opinion (R., p. 22). The Appellate Division of the New York Supreme Court, Third Judicial Department, affirmed the order of dismissal in a *Per Curiam* opinion (R., pp. 25-26); and the Court of Appeals, the court of last resort of the State of New York, affirmed the order of the Appellate Division, without opinion (R., p. 28).

Reasons for Granting the Writ.

1. In holding that Section 1898-a of the New York Penal Law is constitutionally valid, the said Court of Appeals has decided an important question involving due process of law in a way probably in conflict with applicable decisions of this court. See decisions cited on p. 3 *infra.*

2. In so holding, the said Court of Appeals has decided an important question of constitutional law which has not been, but should be, settled by this Court.

3. There is a confusion in the State Courts upon this question and the public interest will be promoted by the prompt settlement in this Court of the question.

---

* A copy of Section 1898-a appears at p. 4 of the brief.

State Court decisions showing such confusion are:

People v. Burt, 258 App. Div. (N. Y.) 896.

People *ex rel.* Dixon v. Lewis, 249 App. Div. (N. Y.) 464.

People *ex rel.* Fry v. Hunt, 29 N. Y. Supp. (2d) 927.

People *ex rel.* Shubert v. Pinder, 9 N. Y. Supp. (2d) 311.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York should be granted.

STEPHEN ROGALSKI,
Petitioner in pro. per.,
Box B, Dannemora, N. Y.

PETITIONER'S

BRIEF

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

The order of the Court of Appeals of the State of New York was entered on April 22, 1943.

The jurisdiction of this Court is conferred by the Fourteenth Amendment of the Constitution of the United States and by Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

The statement of the case having been given in the preceding petition, in the interest of brevity that statement is not repeated.

POINT I.

A conviction predicated on Section 1898-A of the New York Penal Law is void, as this statute violates the 14th Amendment to the National Constitution.

The pertinent part of Section 1898-a of the New York Penal Law which is under attack on this appeal reads as follows:

> "§1898-a. Weapons in automobiles; presumption of possession:
>
> The presence in an automobile, other than a public omnibus, of any of the following weapons, instruments or appliances, viz., a pistol, a machine gun, a sub-machine gun, a sawed-off shotgun, a black-jack, a slingshot, billy, sandclub, sandbag, metal knuckles, bludgeon, dagger, dirk, stiletto, bomb or silencer shall be presumptive evidence of its illegal possession by all the persons found in such automobile at the time such weapon, instrument or appliance is found."

The breadth of the presumption in this statute is manifest. The word "presence," as here employed and construed in the instant case (R., pp. 8-9; ff. 24-26), means concealed or otherwise, and the phrase "by each of the persons" means irrespective of knowledge of the presence of such weapon.

Under this construction the statute fixes no reasonable or justifiable standard of criminality, as was so tersely illustrated in People *ex rel.* Dixon v. Lewis, 249 App. Div. (N. Y.) 464, as follows:

> "But to say that one who innocently steps into an automobile may, *ipso facto,* place himself in the criminal class, and subject himself to criminal prosecution, because of the unrelated fact that at some time a pistol had been placed in the car and still remains there, is to assert something that is unreal, and has not the support of reason. If this presumption were sound in law under our constitutional limitations, it is difficult to see why it may not be extended with equal force to every home in the State; as homes, and 'hideouts' of various kinds, have been reduced to their purpose by criminals. The patient on his way to the hospital, or the physician or clergyman being hastily conveyed to the bedside of the sick, may be jeopardizing his legal character. If this presumption be legally effective, one may be convicted of a crime when guilty of no unlawful act, has no guilty knowledge, harbors no evil intent. This result is not within the contemplation of the common law, nor of our Constitution. It amounts to a total disregard of due process of law."

In People *ex rel.* Shubert v. Pinder, reported in 9 N. Y. S. (2nd) 311, the Court said:

> "Under this statute it would be possible to convict the defendant upon proof of facts enumerated in Section 1898-a, and their conviction could be brought about not upon valid proof but merely upon a dictated, made-to-order presumption. The ultimate fact to be established

here is illegal possession of a gun. The fact proven would be merely the legislative presumption. There would be no actual proof. There is no reasonable connection between the presumption and illegal possession sought to be proved. Under the law the body of the crime must be proved; under Section 1898-a possession is not proved but is presumed. The legislature has no power to declare one guilty of a crime; that is the function of the court after due proof."

In the recent case of People *ex rel.* Fry v. Hunt, 29 N. Y. S. (2nd) 927, wherein the authorities were collated, the Court held the statute unconstitutional, sustained the writ and discharged the prisoner from custody (R., pp. 13-15; ff. 37-45).

The constitutionality of the statute was upheld in People v. Burt, (171 Misc (N. Y.) 166, but, as indicated by Mr. Justice Hinkley in the Fry case (*supra*), the opinion there rendered begs the question (see R., p. 15; ff. 44-45).

The Appellate Division of the New York Supreme Court, Second Department, decided that the statute was constitutional in People v. Burt (258 A. D. 896), and that decision was affirmed by the Court of Appeals (283 N. Y. 740) on the ground that "the question of the constitutional validity of the Penal Law, Section 1898-a, is not presented on this record."

It is noteworthy in this connection that, although appeal was available as a matter of law in the Fry case (*supra*), the Attorney General did not prosecute an appeal from that most recent decision on the question.

Various statutory presumptions have been upheld where there is a rational connection between the fact presumed

and the fact proved. But it will be found that such presumptions are declared to arise from possession, actual or constructive, of the condemned thing.

The presumption arising from possession of policy slips illustrates the doctrine of permitted presumptions; New York Penal Law, Sections 974-975. The offense in Section 974 is possession knowingly, and the presumption of Section 975 is merely that possession is possession knowingly. That is to say possession presumes knowledge of the character of the thing possessed.

Adams v. New York, 192 U. S. 585.

Under Section 2414-a of the New York Penal Law, possession of a false weight or measure is presumptive evidence of knowledge that it is a false weight or measure. And under Section 1308 of the New York Penal Law, the receiver (possessor) of stolen goods is presumed to have knowledge that the goods are stolen.

All these and possibly other like presumptions arise where the thing condemned or stolen is shown to be in the possession of a person. He knows the existence of the thing because he has it in his possession. The presumption runs only to his knowledge of unlawful character or unlawful possession.

How different is the rationality of relation in such a statute of the thing possessed, to knowledge of the thing possessed, from that in the statute under consideration, where, without proof of possession, actual or constructive, of the thing condemned, or without proof even of knowledge of the existence of the thing condemned, or its whereabouts, presumption of illegal possession of the thing con-

demned comes from the mere presence in an automobile where the thing condemned is found.

Precisely in point is the opinion rendered by this Court in Bailey v. Alabama, 219 U. S. 219, wherein Mr. Justice Hughes said (pp. 234-235):

> "We are not impressed with the argument that the Supreme Court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if unrebutted, and still may find the accused not guilty; * * * it is not sufficient to declare that the statute does not make it the duty of the jury to convict, where there is no other evidence. * * * The point is that, in such a case, the statute *authorizes* the jury to convict, * * * the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined."

Surely it shocks the conscience and reason to presume an innocent and lawful occupant of an automobile—"a patient on his way to the hospital, or a physician or clergyman being hastily conveyed to the bedside of the sick," or an industrial worker being conveyed to his job under the "share-your-car" program—to be guilty of possession of a dangerous weapon of which he has never seen or heard of and of which he knows nothing, to say nothing of such presumption arising from the mere presence of an innocent person in the automobile.

If this Section 1898-a of the New York Penal Law does not violate the 14th Amendment forbidding the States from enacting laws depriving the citizen of his life, liberty or property, without due process of law, then the 14th Amendment is meaningless, and the citizen has no security in his life, liberty and property.

In Manley v. Georgia (279 U. S. 1) the Court stated as follows:

> "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty and property."

As well enact a statute providing that all persons present in an automobile where a manslaughter is committed, by the driver's negligence, are presumed to have committed the manslaughter. Section 1898-a of the New York Penal Law does exactly that thing, except that the offense is not manslaughter but is illegal possession of a dangerous weapon.

In McFarland v. American Sugar Company, 241 U. S. 79, 86, 36 S. Ct. 498, 501, this Court said:

> "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

Petitioner submits that this Section 1898-a of the New York Penal Law, which makes all persons in an automobile, no matter for what purpose, or how lacking they are in knowledge of the presence of a pistol, presumptively guilty of a felony for violation of this statute, if a pistol is found anywhere in the automobile, even locked in a compartment or otherwise concealed, is nothing more than a legislative fiat which palpably violates the 14th Amendment to the Federal Constitution.

This Court reviewed a denial of a writ of habeas in Dimmick v. Tompkins, 194 U. S. 540, notwithstanding that a writ of certiorari had been denied to the same petitioner to review the judgment of conviction under which he was

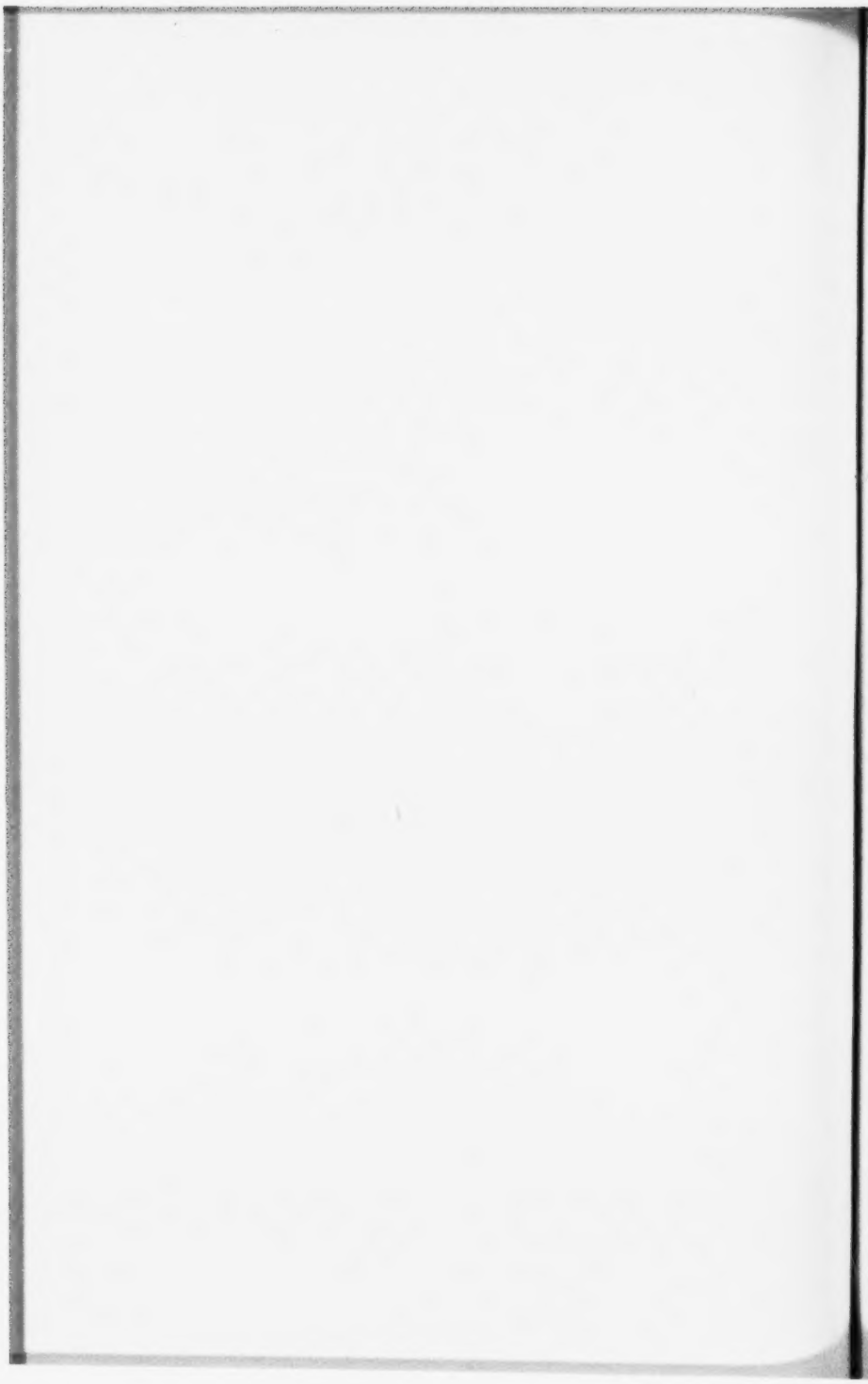
imprisoned. No previous application for a writ of certiorari was made in the case at bar, nor has the constitutional question here at issue ever been submitted to this Court.

Conclusion.

It is respectfully submitted that a writ of certiorari should issue to enable this Court to review the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

STEPHEN ROGALSKI,
Petitioner in pro. per.,
Box B, Dannemora, N. Y.



(26)

IN THE

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No. 187

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for Respondent,
The Capitol,
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ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent.

WENDELL P. BROWN,
First Assistant Attorney-General,
EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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II.

CONSTITUTIONAL PROVISIONS AND STATUTES.

APPENDIX.

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against

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Now comes the respondent in the above entitled cause, by his counsel of record, and opposes the petition herein, and asks that the same be denied.

Statement of the Case.

The petitioner prays for a writ of certiorari to review the order of the Court of Appeals of the State of New York, entered April 22, 1943, in a proceeding upon a writ of habeas corpus.

The order of the Court of Appeals (R., p. 28) affirmed, without opinion, the order of the Appellate Division of the Supreme Court of New York (R., pp. 25-26), which affirmed, *Per Curiam*, the order of the Special Term of the Supreme Court (R., p. 4) dismissing the writ and remanding the relator. No opinion was rendered at the Special Term (R., p. 22).

The State's Statutes.

The pertinent part of Section 1898-a of the Penal Law of New York reads as follows:

> "§ 1898-a. *Weapons in automobiles; presumption of possession.*—
>
> The presence in an automobile, other than a public omnibus, of any of the following weapons, instruments or appliances, viz., a pistol, a machine gun, a sub-machine gun, a sawed-off shotgun, a black-jack, a slingshot, billy, sandclub, sandbag, metal knuckles, bludgeon, dagger, dirk, stiletto, bomb or silencer shall be presumptive evidence of its illegal possession by all the persons found in such automobile at the time such weapon, instrument or appliance is found. Where one of the persons found in such automobile possesses with him a valid license to have and carry concealed the pistol or revolver so found, and he is not there under duress, said presumption of unlawful possession shall not attach to the other persons found in the automobile."

Another section which must be considered on this application, since it states the crime for which petitioner was convicted, is § 1897 (4) of the Penal Law which reads as follows:

> "§ 1897. *Carrying and use of dangerous weapons*
>
> * * * * *
>
> 4. Any person over the age of sixteen years who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him as hereinafter prescribed, shall be guilty of a misde-

meanor, and if he has been previously convicted of any crime he shall be guilty of a felony."

ARGUMENT.

POINT I.

Petitioner was not convicted of a violation of Section 1898-A of the Penal Law of New York.

In his petition to this Court (P., p. 2), petitioner states, substantially, that the mittimus under which he is held is predicated upon a conviction rendered pursuant to Section 1898-a of the Penal Law of the State of New York, which statute, he urges, contravenes, violates and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

He is in error. He was convicted of the crime of carrying a dangerous weapon as a felony.

People v. Rogalski, 256 App. Div. (N. Y.) 995; aff'd 281 N. Y. 581.

The mittimus (R., p. 11, fol. 32) states, in part:

"Indicted for Carrying a Dangerous Weapon, as a Felony, and convicted thereof, as charged, by the verdict of the Jury."

Appended to this brief and identified as Appendix "A" is a copy of the indictment under which petitioner was tried and convicted.

The relevant part of the indictment reads:

"THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CARRYING A DANGEROUS WEAPON, AS A FELONY, committed as follows:

"The defendants on July 2, 1938 in the County of Kings, being then over the age of sixteen years, had in their possession two loaded Revolvers of a size which

might be concealed upon the person, without a written license therefor."

The language of the indictment comprehends the crime prescribed by Section 1897, subdivision 4 of the Penal Law of New York, set out, *supra.*

POINT II.

Section 1898-A of the Penal Law of New York is a valid enactment of a rule of evidence. It is not violative of nor repugnant to the Fourteenth Amendment of the Constitution of the United States.

This section, quoted, *supra,* does not define a crime.

People ex rel. Dixon v. Lewis, 249 App. Div. (N. Y.) 464; aff'd 276 N. Y. 613.

In that case the petitioner for a writ of habeas corpus was detained by virtue of an information charging specifically a violation of Section 1898-a. In its opinion reversing the order of Special Term which dismissed the writ, the Appellate Division said (at page 466):

> "No crime had been committed in so far as known, and no crime was charged. *The information referred to no section of the Penal Law, except section 1898-a, and that section defines no crime.* And were it to be thought that the information was sufficient as a charge of crime under section 1897, still there was no claim that either of the relators had a pistol in his possession. The only charge was that they were in an automobile in which a pistol was found." (Emphasis supplied.)

The Court of Appeals, affirming the decision of the Appellate Division, stated in its memoranda of decision:

> "We do not, however, pass upon the constitutionality of section 1898-a of the Penal Law for the reason that the question cannot be reached on this appeal. *The information fails to state a crime.*" (Emphasis supplied.)

The section establishes a rule of evidence under which a presumption of illegal possession of certain weapons is established.

The State has power to prescribe the evidence which is to be received in the courts of its own government.

Fong Yue Ting v. United States, 149 U. S. 698, 729.

The Court of Appeals of New York on several occasions has sustained the validity of similar presumptions created by statute.

> Possession by a junk dealer of certain bottles or kegs shall be presumptive evidence of his unlawful use, purchase and traffic therein. (*People v. Cannon,* 139 N. Y. 32.)
>
> Possession of certain weapons by any person other than a public officer, concealed on his person, shall be presumptive evidence of carrying or concealing or possession with intent to use the same in violation of law. (*People v. Persce,* 204 N. Y. 397.)
>
> Possession by any person other than a public officer of certain papers used in carrying on, promoting or playing the "policy game" shall be presumptive evidence of possession thereof knowingly and in violation of law. (*People v. Adams,* 176 N. Y. 351, affd. 192 U. S. 585.)

It is well settled that a statute providing that proof of one fact shall be presumptive evidence of the existence of the ultimate fact in issue does not violate the due process clause of the Federal Constitution where there is some natural connection between the fact proved and the fact presumed, and the presumption is not conclusive or arbitrary or unreasonable.

People v. Cannon, supra.

People v. Adams, supra.

Such a presumption, it has been said, is merely "an administrative assumption or determination for procedural purposes" the truth of which is always open to rebuttal.

Welty v. State, 180 Ind. 411, 100 N. E. 73.

Affirming *People v. Adams, supra,* this Court in *Adams v. New York,* 192 U. S. 585 at pages 598, 599 stated:

> "It is further urged that the law of the State of New York, Penal Code, § 344b, which makes the possession by persons other than a public officer of papers or documents, being the record of chances or slips in what is commonly known as policy, or policy slips, or the possession of any paper, print or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly in violation of section 344a, is a violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives a citizen of his liberty and property without due process of law. We fail to perceive any force in this argument. The policy slips are property of an unusual character and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only *prima facie* evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government. *Fong Yue Ting v. United States,* 149 U. S. 698, 729."

The presumption created by Section 1898-a of the Penal Law is not conclusive. It does not relieve the State of the necessity of proving, beyond a reasonable doubt, the commission by a defendant of a crime to which the presumption attaches. It does not deprive a defendant of the protection

afforded by the due process clause of the Constitution of the United States. It merely shifts the burden of proof and calls upon a defendant to explain facts and circumstances peculiarly within his knowledge.

It is not arbitrary or unreasonable. Where the weapon involved is a pistol or revolver licensed in the name of one of the occupants of an automobile, the statute affords protection to other occupants in these words:

> "Where one of the persons found in such automobile possesses with him a valid license to have and carry concealed the pistol or revolver so found, and he is not there under duress, said presumption of unlawful possession shall not attach to the other persons found in the automobile."

The statute satisfies the test of rationality. There is a rational connection between the presence of an unlicensed pistol or revolver in an automobile and its possession by the occupants of the automobile. In a day when the automobile has been widely used by criminals as an aid in their illegal schemes, and has in fact become a frequent instrument of robbery and murder, it is reasonable to say that the unexplained presence of an unlicensed pistol in a car is evidence that it was in the possession of those who were using the car.

The conviction of Rogalski did not rest solely on the presumption created by Section 1898-a of the Penal Law. Testimony was produced showing that he had on his person two cartridges adaptable to use in the guns found in the automobile in which he was a passenger *(People v. Rogalski, supra)*. Thus, there can be no justifiable claim by the petitioner that he was convicted solely on the presumption created by the statute. Factual evidence was produced to strengthen the presumption. It was upon all the evidence that the Jury found the defendant guilty.

Petitioner, at pages 2 and 3 of his petition, urges, as a reason for the granting of the writ of certiorari, that there is confusion in the courts of New York State upon the question of the constitutionality of Section 1898-a of the Penal Law of New York.

Any confusion which may have existed has been eliminated by the decision of the Court of Appeals of New York in the present case *(People ex rel. Rogalski v. Martin,* 290 N. Y. (Mem.) 207; Advance Sheet No. 220, dated July 17, 1943). In his brief to the Court of Appeals, petitioner herein stated the sole question presented to that Court was the constitutionality of Section 1898-a of the Penal Law. The four cases cited by petitioner on page 3 of his petition are decisions of lower courts decided prior to the decision of the Court of Appeals herein.

CONCLUSION.

We respectfully submit that this cause presents no question sufficiently substantial to warrant review by this Court and urge that the petition be denied.

Dated: August 5, 1943.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the
State of New York,
Attorney for Respondent,
The Capitol,
Albany, New York.

ORRIN G. JUDD,
Solicitor General,
Solicitor for Respondent,
WENDELL P. BROWN,
First Assistant Attorney-General,
EDWARD L. RYAN,
Assistant Attorney-General,
Of Counsel.

APPENDIX "A"

Indictment.

COUNTY COURT

OF THE

COUNTY OF KINGS.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

PHILIP KLEIN, STEVE ROGALSKY, alias STEPHEN ROGALSKI, LEONARD SHINSKY, alias FRANK GERSCHINSKY, SYLVIE TODARO, alias SYLVIA TODARO,
Defendants.

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CARRYING A DANGEROUS WEAPON, AS A FELONY, committed as follows:

The defendants on July 2, 1938, in the County of Kings, being then over the age of sixteen years, had in their possession two loaded Revolvers of a size which might be concealed upon the person, without a written license therefor.

The defendant Philip Klein on January 30, 1931, was duly convicted upon trial of the crime of petit larceny in the Court of Special Sessions of the County of Kings before the Honorable Justice Caldwell, Walling and Solomon and the sentence thereupon was House of Refuge.

The defendant Steve Rogalsky, alias Stephen Rogalski, on April 9, 1934, was duly convicted upon his own confes-

sion and plea of guilty of the crime of Robbery in the Second degree, unarmed, in the County Court of the County of Kings, before the Honorable Alonzo G. McLaughlin, County Judge, and the sentence thereupon was New York State Reformatory at Elmira.

The defendant Leonard Shinsky, alias Frank Gerschinsky, on February 13th, 1923, was duly convicted upon his own confession and plea of guilty of the crime of Burglary in the Third degree, in the County Court of the County of Kings, before the Honorable Franklin Taylor, County Judge, and the sentence thereupon was that he serve five years at Sing Sing Prison.

The defendant Sylvie Todaro, alias Sylvia Todaro, on June 22, 1931, was duly convicted upon her own confession and plea of guilty of the crime of Petit Larceny, in the County Court of the County of Kings, before the Honorable Alonzo G. McLaughlin, County Judge, and the sentence thereupon was suspended during the good behavior of the said Sylvia Todaro, and Probation imposed.

WILLIAM F. X. GEOGHAN,
District Attorney,
By SAMUEL GOLDSTEIN.

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No. 187

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CHARLES ELMORE CROPLEY
CLERK

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WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,
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REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STEPHEN ROGALSKI,
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Box B, Dannemora, N. Y.

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Cases Cited.

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Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Comes now, Stephen Rogalski, the petitioner in the above entitled proceeding, in *propria persona,* and opposes the arguments set forth in the respondent's brief and respectfully asks that the petition herein be granted.

ARGUMENT.

POINT ONE.

The indictment originated from Section 1898-A of the New York Penal Law, the basis upon which statute petitioner was convicted.

In his brief (B., p. 3), opposing the Writ of Certiorari by which petitioner prays to have the order of the Court of Ap-

peals, entered April 22, 1943, reviewed by this Honorable Court, in an appeal from a proceeding upon a Writ of Habeas Corpus, respondent alleges that petitioner is in error in averring that the mittimus under which he is being held is predicated upon a conviction rendered pursuant to Section 1898-A of the Penal Law of the State of New York, and which statute is in direct contravention, violation of and repugnance to the Constitution of the United States (P., p. 2).

In order to determine adequately whether respondent is correct, petitioner respectfully begs this Honorable Court for leave to make a part hereof certain portions of the Record on Appeal had previously in the criminal matter (People v. Rogalski, 256 App. Div. (N. Y.), 995; Aff'd 281 N. Y. 581). Aside from having charged Section 1898-A to the jury verbatim (p. 151, f. 453), the trial court construed the statute to mean that, because of your petitioner's mere presence in the automobile where two revolvers had been found, your petitioner, by virtue of Section 1898-A, *was in possession, conscious possession* (p. 154, f. 462), and that the prosecution was not required to establish actual possession, the body of the crime sought to be proven in the indictment (p. 151, f. 451):

> "Trial Court: We have a statute, Section 1898-A of our Penal Law, which does not require the prosecution to actually prove which one of the men * * * owned or possessed or placed a revolver in the car. When a number of individuals are found in there * * * the statute presumes that all the occupants of that car are in possession illegally * * *."

Counsel for the petitioner urged the trial court to charge on constitutional and common law grounds, as follows (p. 159, ff. 476-7):

> "Mr. Ryan: Now, your Honor, I ask you to charge that since the defendant is presumed to be innocent un-

til proven guilty beyond a reasonable doubt, the jury is bound to commence their consideration of the evidence in this case by presuming that the guns were not in the possession of the defendant Rogalski, but in the possession of one of the other defendants in the car.

The Court: I refuse to charge as requested, except as I have already charged.

Mr. Ryan: Exception."

The trial court's refusal to charge as was requested, for all defendants, is in itself a denial of due process and again when Section 1898-A was delivered to the jury (p. 158, f. 473):

"Mr. Ryan: I take exception to your Honor's charge of the Section known as 1898-A."

Coffin v. United States, 156 U. S. 432.

Counsel also took exception to the court's denial to set the verdict aside on the ground that "there was an invasion of the constitutional rights of these defendants, in that they did not receive a trial under the due process of law section of the Constitution * * *that when these men took the stand in this court they had to prove their innocence" (pp. 165-166, ff. 495-498).

It cannot be sincerely urged that Section 1898-A was not the controlling factor in guiding the jury in its verdict of guilty (pp. 158-159, ff. 470-479). The presumption of Section 1898-A was the basis for the jury's verdict (Bailey v. Alabama, 219 U. S. 219).

The respondent further contends in his brief herein on page 3, that the crime embodied in the indictment emanates from Section 1897, Subd. 4. The indictment specifies no particular statute upon which it was founded. However,

petitioner respectfully directs this Court's attention to the opinion rendered by Justice Hinkley in Fry v. Hunt, 29 N. Y. S. (2nd) 927, and which is annexed as Exhibit "B" to the Record on Appeal herein (R., pp. 13-15). There the same query arose as evidenced by the court's statement (R., p. 13). There is no question but that Section 1897, Subd. 4 was also used in the Fry case *(supra)*. This fact is made indisputable by Justice Hinkley's reference to the former conviction (R., p. 15, f. 44), and it is only under Section 1897, Subd. 4 that proof of such conviction is required to increase the degree of the offense from a misdemeanor to a felony. Section 1898-A of the Penal Law was passed by the New York Legislature under the guise of a procedural presumption. Section 1897, Subd. 4 defines the crime and is subservient to Section 1898-A which presumes it.

The respondent would remove the foundation which had been laid by Section 1898-A and upon which the indictment is built, and leave the indictment, comprehending Section 1897, Subd. 4, standing undermined and without support in fact.

If the presumption did not attach to the occupants in the car in the first instance, then the Grand Jury could not have found the indictment accusing four persons, as here, of possessing two pistols.

It is too plain to be argued that nothing less than actual or constructive possession must be established under Section 1897, Subd. 4. Possession under this section must be proven without the aid of the presumption. And if possession were proven, as inferred by the respondent, then why was Section 1898-A invoked to presume it?

POINT TWO.

Section 1898-A of the Penal Law of New York is not a valid enactment of a rule of evidence. It was invoked against petitioner under the guise of a procedural presumption in direct contravention, violation of and repugnance to the Fourteenth Amendment of the Constitution of the United States.

Petitioner is in accord with the respondent that the State has the power to prescribe the evidence which is to be received in the courts of its own government (Respondent's Brief, p. 5).

However, this power has its constitutional limitations. The guarantee of due process of law under the Fourteenth Amendment of the National Constitution demands only that the means used shall have a real, fair and natural relation to the ultimate fact sought to be established.

Under Section 1898-A, Penal Law there is no rational connection between the fact proved (guns) and the fact presumed (possession).

The State cannot subvert that fundamental rule of justice which holds that the defendant shall be presumed to be innocent until he is proven guilty beyond a reasonable doubt.

Section 1898-A presumes possession to all occupants. If the word "guilty" be substituted for "possession" the same effect would be realized. Possession is a crime under Section 1897, Subd. 4. Under the common law, the legal presumption would be directly the reverse of that declared by Section 1898-A. Either the legal presumption of innocence is a nullity or Section 1898-A is unconstitutional.

Under the permitted presumptions, if the defendant allowed any of them to go unrebutted, the People would still have to prove the defendant guilty beyond a reasonable doubt.

However, under Section 1898-A, the presumption unrebutted is fatal. When the defendant takes the stand to rebut this presumption he actually is compelled to prove himself innocent. And, in attempting to prove himself innocent, he is compelled to take the witness stand to deny knowledge of the condemned weapons. Regardless to what degree this presumption is repelled, it still stays with the defendant from the beginning until the end of the trial.

On page 5 of his brief, respondent undertakes to show this Court what supposedly are presumptions akin to the presumption under attack:

People v. Adams, 176 N. Y. 35; aff'd 192 U. S. 585.
People v. Cannon, 139 N. Y. 32.
People v. Persce, 205 N. Y. 397.

The above cases all contain presumptions which arise from *actual or constructive possession* of the condemned thing. They serve to strengthen petitioner's claim in his original brief. Petitioner is not quarrelling with a presumption that comes from possession and runs into knowledge.

Under Section 1898-A not only does actual and constructive possession go unproved, but *conscious* possession is simply presumed. Yet, the respondent says that the presumption "merely shifts the burden of proof and calls upon a defendant to explain facts and circumstances peculiarly within his knowledge" (B., p. 7).

It is also alleged by the respondent, on page 7, that petitioner was not convicted solely on the presumption created by Section 1898-A. The fact remains that the presumption was invoked instead of the presumption of innocence and its totality of effect convinced the jury to convict.

Bailey v. Alabama, *supra.*

True, the police found two cartridges on the person of the petitioner. But, if factual evidence is to be drawn herein, then there was no evidence which would show that those cartridges actually belonged to either one of the two revolvers found in the automobile. The revolvers were not visible, and there was not the evidence to warrant the jury in concluding beyond a reasonable doubt that the petitioner had illegal possession or guilty knowledge thereof.

Petitioner testified that he found the cartridges in a compartment on the dashboard, immediately brought them to the attention of Klein (who owned, operated and had exclusive dominion and control of the automobile) at the time the police ordered him to pull over to the curb (Cri. Record on Appeal, p. 105, f. 315).

Klein had made no effort to refute the petitioner's claim.

If the statements made by petitioner were untrue, then they could have been unsubstantiated by proper proof. It was instinctively natural for Klein to interpose a defense, which he had not done, but instead corroborated the petitioner's testimony by admitting that before the car was intercepted by the police your petitioner had shown him the cartridges (Cri. Record on Appeal, p. 83, f. 249). Klein, moreover, was acquitted.

At any rate, aside from the presumption of guilt which Section 1898-A contains, your petitioner was presumed to be innocent until his guilt was established by evidence sufficient to convince a jury beyond a reasonable doubt of his guilt.

The presumption of innocence has been tested in the crucible of time since the inception of jury trials. Section 1898-A was created by the state legislature several years ago. The public became aware that it was left open to misdirected prosecution and conviction and criticized the statute in unsparing terms as the "gun-in-auto-guilt" law. The public's pulse was registered in 1939 when the New York State Legislature unanimously voted to repeal Section 1898-A, but the Governor who had sponsored the law refused to sign it out of the books.

The claim, in respondent's brief on page 8, that the confusion which exists in the State Courts has been eliminated by the decision of the Court of Appeals of the State of New York in the present cause (Peo. *ex rel.* Rogalski v. Martin, 290 N. Y. (Mem.) 207; Advance Sheet No. 220, dated July 17, 1943), is without merit.

The recent decision of the Court of Appeals does not dispel the confusion that exists; if anything, it adds to the confusion.

Save for a *Per Curiam* opinion rendered by the Appellate Division (R., pp. 25-26), no court has rendered an opinion defending the constitutionality of Section 1898-A, Penal Law, in either the criminal proceeding (People v. Rogalski, *supra)*, or the civil proceeding herein (Peo. *ex rel.* Rogalski v. Martin, *supra)*.

This conception by respondent lacks cogency. It does not conform with the Fry case *(supra)*. Justice Hinkley in that case had made extensive research, as evidenced by the collection of authorities on the statute, and manifestly signified that he did not recognize the "no-opinion" decisions rendered in the Rogalski case on the criminal appeal.

It certainly exhibits a state of confusion since the law is applied so capriciously. The Fry case had come after petitioner's prior appeal, and Fry won his discharge, but petitioner is still imprisoned. The courts in the State of New York are not in accord as to the constitutionality of Section 1898-A, and this Court should settle the question. The central difference of liberty and imprisonment under this statute is still a matter of geography within the boundaries of the State.

CONCLUSION.

This case is up before this Court on the authority of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, and petitioner respectfully asks this Honorable Court to take judicial notice thereof, and prays that the Writ of Certiorari be granted.

Respectfully submitted,

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Petitioner in Pro. Per.,
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(21)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 187

THE PEOPLE OF THE STATE OF NEW YORK, on the relation of STEPHEN ROGALSKI,

Petitioner,

against

WALTER B. MARTIN, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

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May It Please the Court:

Now comes the respondent in the above entitled cause, by his counsel of record, and supplements his brief in opposition to the petition herein.

ARGUMENT.

POINT ONE.

The dismissal of the writ of habeas corpus by the Courts of New York State did not operate to deprive petitioner of his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In his reply brief (p. 2), petitioner has asked leave of this Court to refer to the Record on Appeal in the criminal

action in which the judgment of conviction was rendered against him *(People v. Rogalski,* 256 App. Div. (N. Y.) 995, aff'd, 281 N. Y. 581) and urges, at page 3, that there was a denial of due process in the Trial Court's refusal to charge as requested and in its denial of the motion to set the verdict aside. We direct this supplemental brief to that question.

At the close of the People's case, defendant's counsel moved for a dismissal of the indictment, urging the unconstitutionality of Section 1898-a of the Penal Law of New York (R., fols. 184-187)* and, on the same ground, moved to set aside the verdict (R., fols. 495-498). On his appeals from the judgment of conviction to the Appellate Division of the Supreme Court of New York and to the Court of Appeals of New York (Br., pp. 5-9) he raised and argued the same question.

Both Courts affirmed the judgment of conviction, thereby determining all questions presented on the appeals. Petitioner did not avail himself of the opportunity to apply to this Court for a review of any federal question.

It has been well settled by this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged.

Knewel v. Egan, 268 U. S. 442, 445 and cases cited.

This, too, is the rule followed by the courts of New York.

People ex rel. Hubert v. Kaiser, 206 N. Y. 46, 53.

Petitioner does not raise the question of jurisdiction of the trial court over his person or the crime charged.

Having failed to pursue by appeal to this Court his remedy in the criminal action, petitioner, by this proceeding,

* All page and folio references are to the Record on Appeal and the defendant-appellant Rogalski's brief in the Court of Appeals of New York in the criminal action.

seeks to review again the evidence adduced on his trial and the trial court's rulings thereon. This Court has held that *habeas corpus* cannot be so invoked.

In *Riddle v. Dyche,* 262 U. S. 333, the Court, at page 335, said:

> "That the trial court had jurisdiction to try and punish the appellant for the offense with which he was charged is not disputed. The attempt is collaterally to impeach the record, showing upon its face that a lawful jury was duly empaneled, sworn and charged. Appellant's remedy, as suggested in the mandamus proceeding, was by writ of error. He did not avail himself of it and whatever may have been the cause or excuse for not doing so, *habeas corpus* cannot be used as a substitute."

Again, in *Woolsey v. Best,* 299 U. S. 1, this Court, *per curiam,* stated:

> "It is well established that the writ of *habeas corpus* cannot be used as a writ of error. This is the rule in Colorado as well as in this Court. The judgment of conviction was not subject to collateral attack. [Cases cited.] It is apparent from the record submitted that the state court had jurisdiction to try the appellant for violation of the statute in question and that any federal question properly raised as to the validity of the statute could have been heard and determined on appeal to this Court from the final judgment in that action. The Supreme Court of the State was not required by the Federal Constitution to entertain such questions on the subsequent petition for *habeas corpus,* and it does not appear that its denial of the petition did not rest upon an adequate non-federal ground."

To the same effect is the holding in *Knewel v. Egan, supra,* at page 445:

> "A person convicted of crime by a judgment of a state court may secure the review of that judgment by the highest state court and if unsuccessful there may then resort to this Court by writ of error if an appropriate federal question be involved and decided

against him; or, if he be imprisoned under the judgment, he may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction. See *Ex parte Royall,* 117 U. S. 241. But if he pursues the latter remedy, he may not use it as a substitute for a writ of error. *Ex parte Parks,* 93 U. S. 18; *In re Coy,* 127 U. S. 731."

On this point also, the courts of New York are in accord with the holding of this Court.

People ex rel. Holt v. Lambert, 237 App. Div. (N. Y.) 39, aff'd, without opinion, 262 N. Y. 511.

CONCLUSION.

We respectfully submit the judgment of conviction was rendered, and was sustained on appeal, by due process of law, and urge anew that this cause presents no question sufficiently substantial to warrant review by this Court and that the petition be denied.

Dated: September 13, 1943.

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